Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

_____Term, 1978

No. 77-1441

RANDY LEON MANZER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Randy Leon Manzer, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, entered in

the above entitled case on March 10, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported 76-2131, and is printed in Appendix A hereto, infra, page A-1. The judgment of the United States District Court for the Northern District of Oklahoma is printed in Appendix B hereto, infra, page B-1.

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on March 10, 1978. The jurisdiction of the Supreme Court of the United States is invoked under:

1. Federal Rules of Criminal Procedure Rule 32(c)(2), 18 U.S.C.A.

2. Title 18, U.S.C. §3577.

3. Federal Rules of Criminal Procedure Rule 32(c)(1).

STATUTE INVOLVED

Title 21, U.S.C. §841(a)(1) and §846

QUESTIONS PRESENTED

1. To determine whether the Trial Court is required to give an entrapment instruction when requested by the Petitioner upon defense testimony that Petitioner was entrapped, even though that testimony was contradicted by the testimony of a prosecution witness.

2. To determine the sufficiency of the evidence upon which a conviction was based in this case.

STATEMENT OF CASE

In the early morning hours of June 21, 1976, Petitioner was arrested by Federal Agents and local police officers for suspicion of conspiracy to deliver illegal drugs, unlawful delivery of drugs, and unlawful possession of drugs with intent to distribute. Thereafter, on July 13, 1976, Petitioner was charged in three counts of a five-count indictment. Count I alleged

conspiracy to possess and deliver non-narcotic controlled dangerous substances; Count III alleged an unlawful delivery of a non-narcotic controlled dangerous substance; and Count V alleged unlawful possession of a non-narcotic controlled dangerous substance with the intent to distribute, all in violation of Title 21, United States Code, Section 841(a)(1).

On July 22, 1976, Petitioner entered his plea of not guilty and the matter was docketed for jury trial. On September 20, 1976, after three days of trial, the jury selected in this matter returned a verdict of guilty as charged in Counts I, III and V of the indictment. Thereafter, on November 3, 1976, Petitioner was sentenced to serve a term of four and one-half years on Count I, a term of four years on Count III and a term of three years on Count V. All sentences were in the custody of the United States Attorney General, and the senten-

ces were ordered to run consecutively. In addition, Petitioner was given a six-year special parole term to begin at the expiration of confinement.

On November 3, 1976, Petitioner initiated this appeal by filing his "Notice of Appeal" with the Clerk of the United States District Court for the Northern District of Oklahoma.

REASONS FOR GRANTING WRIT

1. To determine whether the Trial Court is required to give an entrapment instruction when requested by the Petitioner upon defense testimony that Petitioner was entrapped, even though that testimony was contradicted by the testimony of a prosecution witness.

2. To determine the sufficiency of the evidence upon which a conviction was based in this case.

Under the testimony admitted at the trial

of this case, a substantial question of fact existed as to whether the Petitioner was entrapped. If the testimony of government witnesses was to be believed, no entrapment occurred. However, if the testimony of the Petitioner is to be believed, the idea of dealing in illegal drugs was placed in his mind by a government undercover agent, and thereafter, Petitioner was encouraged by the undercover agent to participate in drug transactions.

Under our present system of jurisprudence, all questions of law are decided by the Court, and all questions of fact are within the province of the jury. In the instant case, the Trial Court erroneously invaded the province of the jury by refusing to grant Petitioner's requested instruction on entrapment, even though there was evidence presented by Petitioner that entrapment occurred.

A large portion of the evidence presented against Petitioner during the trial of this cause was circumstantial. The general rule that circumstantial evidence, to support a conviction, must be such that the conclusion drawn therefrom excludes every reasonable hypotheses other than guilt applies to criminal conspiracy. UNITED STATES v. THOMAS 52 F. Supp. 571; SHANNABARGER v. UNITED STATES 99 F. 2d 957; BECKMAN v. UNITED STATES 96 F.2d 78; and GERSON v. UNITED STATES 25 F.2d 49. Conspiracies cannot be established by mere suspicion. GLOVER v. UNITED STATES 306 F. 2d 594 and UNITED STATES v. NARDIELLO 303 F.2d 876.

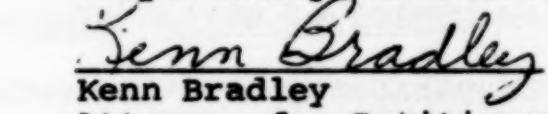
CONCLUSION

The convictions in this case should be set aside because of the Trial Court's refusal to grant Petitioner's requested

instructions on entrapment. The evidence in the case warranted such an instruction, and refusal to give such instruction constituted a prejudicial invasion of the province of the jury. Had such an instruction been given, the jury might well have acquitted the Petitioner of the charges then on trial.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I served a full, true and correct copy of the Petition for Writ of Certiorari and Appendices attached thereof to the United States Attorney for the Northern District of Oklahoma, Federal

Bldg., Tulsa, Oklahoma, and to the Solicitor General of the United States, Washington, D.C. 20543.

Kenn Bradley

Kenn Bradley

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RANDY LEON MANZER, Defendant-Appellant.	No. 76-2131
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL STEPHEN WEDEL, Defendant-Appellant.	No. 76-2132
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY WAYNE THOMAS, Defendant-Appellant.	No. 76-2133
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROY LEE CECIL, Defendant-Appellant.	No. 76-2134

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 76-CR-98)

Submitted: January 27, 1978

Kenneth P. Snoke, Assistant United States Attorney (Nathan G. Graham, United States Attorney, and Ben F. Baker, Assistant United States Attorney, on the brief), for Plaintiff-Appellee.

Kenn Bradley, Tulsa, Oklahoma, for Defendants-Appellants Manzer, Thomas and Cecil.

Steven A. Gall, Denver, Colorado, for Defendant-Appellant Wedel.

Before SETH, DOYLE and LOGAN, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from convictions of the four defendants-appellants on several counts of possession and distribution of drugs. Count I of the five-count indictment charged all four appellants, Randy Leon Manzer, Michael Stephen Wedel, Gary Wayne Thomas, and Roy Lee Cecil, with con-

spiracy to possess and distribute methamphetamine and secobarbital, both Schedule II non-narcotic controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1970). A fifth defendant, George Robert Wedel, was also named in this count, but was granted a severance and is not part of this appeal.

Count II charged Michael Wedel with distributing approximately twenty-nine grams of methamphetamine, in violation of 21 U.S.C. §841(a)(1).

Count III charged Randy Manzer with distributing approximately 3220 tablets of secobarbital, in violation of 21 U.S.C. §841(a)(1).

Count IV charged Gary Thomas with possessing with intent to distribute various controlled substances, in violation of 21 U.S.C. §841(a)(1).

Count V charged Randy Manzer with pos-

sessing with intent to distribute 9977 tablets of secobarbital, in violation of 21 U.S.C. §841 (a)(1).

A jury trial was had before Judge Cook. All four appellants were convicted on all counts and were given substantial sentences.

In late May 1976, Mike Fisher, a drug dealer and user acting as a paid government informer, sought out appellants Manzer and Wedel, and informed them that a man named "Curtis" who was in fact Norman Grayson, an undercover Drug Enforcement Agency officer, had a large amount of money, which he wished to spend on drugs. Fisher persuaded appellant Manzer to obtain some methamphetamine from his "Uncle Gary."

On June 1, 1976, at noon, Fisher traveled with Manzer and Wedel to a drive-in restaurant. From there, Manzer went alone in Fisher's car to 847 East 52nd Place North in Tulsa, Oklahoma, Thomas' residence, where he re-

mained for about thirty minutes before returning to Wedel and Fisher. Shortly after 7:00 p.m. on June 1, 1976, Manzer and Wedel drove to a convenience store, where Wedel remained while Manzer went to 847 East 52nd Place North. Manzer then returned to the convenience store, and drove with Wedel to Fisher's residence. Wedel then joined Officer Grayson in another vehicle, and handed him a magazine containing 29 grams of methamphetamine. Officer Grayson paid Fisher $900, and Fisher paid Manzer and Wedel.

On June 4, 1976, Arrangements were made to sell 3000 secobarbital tablets to Officer Grayson. Fisher and Manzer drove to North Tulsa. Manzer then drove alone to 847 East 52nd Place North, remained there for thirty minutes, and returned to pick up Fisher. Manzer gave Fisher a brown paper bag, which Fisher turned over to Officer

Grayson. The bag contained 3220 secobarbital tablets.

On June 20, 1976, arrangements were made for Officer Grayson to buy another 10,000 tablets of secobarbital. Manzer met Fisher at a parking lot in Tulsa. Manzer was driving a red pickup truck that had been seen at 847 East 52nd Place North. Manzer did not have any drugs at this time, but told Fisher that this was a "dry run" and that there would be counter-surveillance. Manzer then drove to 847 East 52nd Place North, remained there about thirty minutes, and then drove the red pickup truck to a parking lot where he was to meet Fisher again. The pickup truck was followed by a Thunderbird driven by appellant Cecil. Manzer showed Fisher some pills, which he said were those ordered by Officer Grayson. Fisher then advised a Drug Enforcement Agency officer that Manzer had the pills and that the Thunderbird dri-

ven by Cecil, which was parked nearby, was being used for counter-surveillance. After Manzer thew a bag containing 10,000 secobarbital tablets out the window, officers arrested him and Cecil. Officers then went to 847 East 52nd Place North, entered forcibly, and arrested those present, including appellant Thomas. The following day the premises were searched pursuant to a warrant. Officers found papers indicating that appellants Thomas and Cecil, and several other persons, resided there, and some secobarbital tablets.

All four appellants claim that it was error for the trial court to refuse to instruct the jury on the issue of entrapment. They argue that, when first contacted by Fisher, Manzer had not been involved in the drug business for several years, and had no desire to get involved in it again. Fisher had to go to some effort to persuade Manzer to sell the drugs. Fisher told Manzer that his wife was ill, and that he needed

the money he would make from the drug sales to help her.

The Supreme Court has held that entrapment is available as a defense "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." Sorrells v. United States, 287 U.S. 435, 442 (1932). It was said in that case that it was permissible for government officers to afford the defendant the opportunity to commit the crime. This definition has been approved in this Circuit. See United States v. Gurule, 522 F.2d 20, 23 (10th Cir. 1975), cert. denied, 425 U.S. 976 (1976). The principal issue in a case in which the entrapment defense is asserted is whether the defendant was predisposed to commit the crime. See United States v.

Russell, 411 U.S. 423, 433 (1973). If the prosecution can establish this predisposition, the defense of entrapment is not available. Hampton v. United States, 425 U.S. 484, 488-89 (1976). If there is conflicting evidence on whether entrapment occurred, the question is one for the jury. Once the defendant has introduced enough evidence to raise the issue, the burden rests on the government to prove beyond a reasonable doubt the absence of entrapment. Gurule, supra, at 23-25.

Undercover activity on the part of law enforcement officials is a necessary part of enforcing drug control laws. The Supreme Court has recognized that the only practicable means of detecting drug-related offenses is to infiltrate drug rings, and that this requires gaining the confidence of the suspected criminals. See United States v. Russell, 411 U.S. 423, 432 (1973).

Drug traffic is a "prime example" of a type of criminal activity for which strategem or deception is needed and permitted for this reason. Lewis v. United States, 385 U.S. 206 (1966).

The appellants in the present case contend that Manzer was reluctant to deal in drugs, and had to be persuaded by the informant, Fisher, to go along with them. But this is not unusual. Officer Grayson was an unknown customer seeking to buy a large quantity of drugs. Under such circumstances, most drug dealers would be hesitant at first. See United States v. Pearson, 483 F.2d 809, 811 (9th Cir. 1973). Some persuasive efforts by the government agents or informants must therefore be tolerated.

The question of entrapment is normally one for the jury. However, the trial court may be refused to instruct on it if there is no evidence to support the defense. See

Holloway v. United States, 432 F.2d 775, 776 (10th Cir. 1970); Munroe v. United States, 424 F.2d 243, 245 (10th Cir. 1970) (en banc); Garcia v. United States, 373 F.2d 806, 808-809 (10th Cir. 1967) (dictum). In this case, there is no evidence that the activities of Fisher and Officer Grayson went beyond providing an opportunity to commit a crime that the defendants were already willing to commit. The claim that Manzer was not involved in drug dealing at that time is contradicted by a transcript of a tape recording of a telephone call between Manzer and Fisher, introduced into evidence, in which Manzer refers to sales he is making to other customers. In addition, the uncontradicted facts show that Manzer knew exactly where to go to obtain the large quantity of drugs involved in this case, and had no difficulty completing the transactions. This contradicts his claim that he was no

longer involved in the business.

The remaining three appellants, Wedel, Thomas and Cecil, all denied their involvement in the transaction. The law of this Circuit is that a defendant who denies the transaction constituting the crime is not permitted to take the inconsistent position that he was entrapped. See Munroe v. United States, 424 F.2d 243, 244 (10th Cir. 1970) (en banc); United States v. Freeman, 412 F.2d 1181, 1183 (10th Cir. 1969). None of these defendants testified, and none presents any claim that either Fisher or Officer Grayson put any pressure on them to commit the crimes.

All four appellants challenge the sufficiency of the evidence on the grounds that it was largely circumstantial. The use of circumstantial evidence is not reversible error, because circumstantial evidence is not necessarily any less reliable than

testimonial evidence. See Holland v. United States, 348 U.S. 121, 139-40 (1954).

All four appellants argue that the admission into evidence of two fifty-dollar bills found in the possession of appellant Cecil at the time of his arrest, was error because the bills were not properly identified. The bills were properly identified by the testimony of Officer Shannon of the DEA, who testified that they were in Cecil's possession at the time of his arrest, and that their serial numbers matched those of two fifty-dollar bills used by Officer Grayson to make the June 4 secobarbital purchase.

All four appellants assert that it was error for the trial court to admit into evidence the transcripts of certain recorded telephone conversations. At the trial, the attorney for appellants, Manzer, Thomas and Cecil objected to the admission of the transcripts on the ground that they had been

altered.. The attorney did not state what portions of the transcripts were inaccurate; nor does any appellant elaborate on this objection in the briefs. No other grounds for objection was raised at trial; indeed, it was the objecting attorney who originally asked that transcripts (accurate ones) be provided the jury.

Appellant Cecil claims that it was error to deny his motion to quash his warrantless arrest and to suppress the evidence seized in the subsequent search. Cecil's arrest took place after the arrest of Manzer on June 20, 1976. Cecil was driving a Thunderbird that escorted the red pickup truck driven by Manzer when he delivered the 10,000 secobarbital tablets to be sold to Officer Grayson. The Thunderbird was parked near the scene of the would-be sale. Manzer had told Fisher that there was to be counter-surveillance. These facts clearly establish

probable cause for the arrest. The search was lawful as pursuant to a legal arrest.

Appellant Thomas claims that it was reversible error to deny his motion to quash the search warrant for his residence, 847 East 52nd Place North, and to suppress the evidence seized in the search. The search was made the day after the arrests of Manzer, Wedel and Cecil. It was made pursuant to a search warrant. The affidavit in support of the warrant relies on information provided by a confidential, reliable informant and on surveillance of the premises to be searched. There was clearly probable cause for the issuance of the search warrant, and the fruits of the search were properly admitted at the trial.

Appellant Wedel claims that several pieces of evidence were improperly admitted: The first is Government's Exhibit 18, a photograph of a pickup truck with Manzer, Fisher

and Grayson. The appellant argues that the photograph was not properly identified at trial. The testimony of Officer Grayson was sufficient to identify this exhibit. It was properly admitted.

Next, Wedel objects to the admission of Exhibit 2, which consisted of about 3000 pills and a glass vial containing white powder. The objection is that the white powder was not identified. Officer Grayson testified that the pills were the ones thrown out of the pickup truck in a bag by Manzer. He did not know what the white powder was. A chemist for the DEA testified that the pills contained secobarbital. He was not asked about the white powder. It is apparent from his testimony, however, that after completing his analysis, he put the powder originally contained in the bag into the glass vial. At any rate, the amount of powder was very small, and there was no

testimony as to what it was. If there was any error, it was harmless. Moreover, although there was an objection to the admission of Exhibit 2 at trial, it was not on the ground presently asserted.

Wedel objects also to the admission of Exhibit 6, consisting of pills recovered in the search of appellant Thomas' residence. His ground is that they were not properly identified due to the government's failure to show chain of custody. The government's showing of chain of custody was sufficient, and there was no error.

Wedel also appeals from the admission of Exhibits 14 and 15, a notebook and list of names seized from Thomas' residence, on the ground that they were not identified. There is no merit to this claim.

Wedel finally argues that it was error to admit Exhibit 12, a receipt for methamphetamine, or "speed" on the grounds that it was irrelevant and improperly identified. There

is no merit to either contention.

Since there was no error, the judgment of the trial court should be affirmed.

The judgment is affirmed.

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	Docket No.
	)	76-CR-98
	)	
RANDY LEON MANZER,	)	
	)	
Defendant.	)	

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this 3rd day of November, 1976 with his counsel Kenneth Bradley, retained.

There being a verdict of guilty defendant has been convicted as charged of the offense of having violated T. 21, U.S.C., Sections 846 and 841(a)(1), as charged in Counts 1, 3 and 5 of the Indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to

the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count One - Four and one-half (4 1/2) years; Count Three - Four (4) years; Count Five - Three (3) years. It is further adjudged that the sentence imposed in Count Three shall commence at the expiration of and run consecutive to the sentence imposed in Count One; and that the sentence imposed in Count Five shall commence at the expiration of and run consecutive to the sentence imposed in Count Three. It is further ordered that the defendant is sentenced to a special parole term of Six (6) years, as to each of Counts One, Three and Five, concurrently, to commence at the expiration of the sentence of confinement imposed herein.

s/U. S. Magistrate
11-3-76